COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 001511-12**

Tonya Pickett	Employee
Boston Software Corp.	Employer
Acadia Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant, and Koziol)

The case was heard by Administrative Judge Herlihy.

APPEARANCES
Joseph P. McKenna, Esq., for the employee
Alicia M. DelSignore, Esq., for the insurer

HARPIN, J. The employee and insurer cross appeal from a decision awarding the employee § 34A permanent and total benefits for a psychiatric incapacity, but denying any ongoing benefits for a physical incapacity. We vacate the award, and recommit for further findings on the issue of the causal relationship of the employee's present physical disability and her present psychiatric disability.

The employee, thirty-seven years old at the time of the hearing, and a college graduate, worked as a sales person for the employer, a software company. (Dec. 4.) The employee sustained injuries to her back and knee on January 12, 2012, when she slipped and fell down a set of stairs at work. (Dec. 5.) Although her knee condition resolved, id., she continued to treat for back pain that has not abated since the injury. (Dec. 5-6.) At some point after her injury the employee became irritable with her children, felt that she was failing, and was depressed. (Dec. 6, 7.) She sought treatment for her depression from Sandra Garcon, LICSW. (Dec. 7.)

The insurer accepted liability for the employee's physical injuries and began paying her § 34 total incapacity benefits. (Employee br., 1.) On April 23, 2013, the insurer filed a complaint to modify the employee's § 34 benefits. A

conference was held on August 28, 2013, after which an order issued requiring the continuation of the employee's § 34 benefits until March 1, 2014. The insurer was then allowed to reduce the employee's benefits to the maximum § 35 benefits. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file). Both parties appealed the order. Id. On December 16, 2013, a § 11A examination was performed by Dr. Howard Martin. Id. (Dec. 3.) On April 9, 2014, the insurer withdrew its appeal. Rizzo, supra. On May 19, 2014 the parties signed, and the judge approved, a § 19 Agreement, which provided that the insurer would "restore" the employee's § 34 benefits, retroactive to March 2, 2014, and pay them up to July 2, 2014, "at which time the Employee's medical status will be re-evaluated." Id. The insurer was also to pay for pre-operative diagnostic testing and for proposed back surgery, to be performed by Dr. Eric Woodward at the New England Baptist Hospital. Id. The diagnostic testing took place, but the surgery did not. (Tr. 13; Employee br. 2; Insurer br. 2.) The employee's § 34 benefits consequently ended on July 2, 2014, pursuant to the § 19 Agreement.

On September 25, 2014, the employee filed a new claim, for § 34 benefits from July 2, 2014, and continuing, along with medical expenses pursuant to §§ 13 and 30. Rizzo, supra. At the conference on this claim on December 15, 2014, the employee filed a motion to join a claim for § 34A benefits, which was allowed by the judge. Id. On the Conference Memorandum, DIA Form 140, the insurer raised the issues of disability and its extent, § 1(7A), "W/B/T[1] Psych," and the denial of "Psych & Further 34." Id. In her order the judge awarded the employee §34 benefits from July 3, 2014 to January 19, 2015, and § 34A benefits from January 19, 2015 to June 1, 2015. She also ordered the insurer to pay for the employee's psychiatric treatment. Id.

[1] We are unsure what "W/B/T" references.

On May 4, 2015, a § 11A examination was held, again with Dr. Martin. (Ex. 4.) At the hearing on July 15, 2015, the employee sought § 34A benefits from December 12, 2015, as well as §§ 13 and 30 benefits.[2] (Ex. 2; Tr. 3.) The insurer denied liability for any psychiatric condition, and raised § 1(7A) as a defense, among other defenses. (Tr. 3-4.) The employee moved to find the impartial report inadequate, due to its internal inconsistency and lack of rationale as to the doctor's change of opinion on causal relationship from his earlier report in 2013. (Tr. 5.) The judge granted the motion and allowed the parties to introduce further medical evidence. (Tr. 6.) She also allowed the parties to submit their own medical evidence on the employee's psychiatric claim. Id. The insurer later submitted a number of medical exhibits, as did the employee. Among the exhibits submitted by the employee were two psychiatric evaluation reports of Dr. Michael Braverman. (Exs. 6 & 7.) On December 9, 2015, she also submitted, by e-mail to the judge, a report of a December 1, 2015, EMG, along with a paragraph written by the employee's counsel, detailing what he saw as the importance of this report. Rizzo, supra. The e-mail and the report are contained in the DIA's OnBase system, but were not listed as exhibits in the decision, despite

[2] There is no reason given, either in the employee's Hearing Memorandum, the transcript, or the decision, why the employee sought § 34A benefits from December 12, 2015. The conference order awarded her § 34A benefits from January 19, 2015, the day the employee's § 34 benefits were exhausted, to June 1, 2015. The parties then entered into a § 19 Agreement on July 17, 2015 in which the insurer agreed to pay the employee maximum § 35 benefits retroactive to June 2, 2015, and for six months thereafter. Rizzo, supra. The § 35 benefits were continued after the agreed termination, up to the filing of the decision on April 29, 2016. (Employee br., 2.) Thus, the judge's award of § 34A benefits retroactive to January 19, 2015, (Dec. 10), was well before the date claimed by the employee for the onset of the benefits, which would normally require a separate vacation of the award for the period from January 19, 2015 to December 11, 2015. Keslof v. Anna Jacques Hospital, 24 Mass. Workers Comp. rep. 173, 174 (2010); Boyden v. Epoch Senior Living, Inc., 23 Mass. Workers' Comp. Rep. 61, 64 (2009). The insurer has not appealed the award on this ground; thus this potential issue is waived. Zavalu v. Standard Thompson Corp., 28 Mass. Workers' Comp. Rep. 235, 240 (2014) (failure to raise issue on appeal deemed waiver of issue). In any event, we are vacating the entire decision and recommitting it for further findings.

being received by the judge's office prior to the January 28, 2016, close of record date. (Dec. 3.)

On April 28, 2016, the decision was filed, in which the judge adopted Dr. Martin's opinion that the employee's causally related stretch injury to her back disabled her only for up to twenty-four months, after which her current physical disability was due solely to her preexisting lumbar degeneration. (Dec. 6, 8.) The judge found the employee's psychiatric disability (major depression) and incapacity were total and permanent, and adopted Dr. Braverman's opinion that the disability was directly causally related to her industrial injury. (Dec. 7, 9). The judge then awarded the employee § 34A benefits from January 19, 2015, and continuing. (Dec. 10.)

Both parties appeal. The employee argues that the judge erred in failing to consider the EMG report that was submitted before the close of the record, especially as the impartial physician, Dr. Martin, noted in his deposition testimony that if an EMG showed chronic, as opposed to acute, changes in the employee's spinal nerves, the employee's current nerve pain would be more likely related to her injury. We agree.

The judge adopted the opinion of Dr. Martin that, because of a negative bone scan and a negative CT scan, the stretch injury to the employee's lumbar nerve root resolved about eighteen to twenty four months after her industrial injury. (Dec. 6; Ex. 4.) After that point, the doctor felt, and the judge found, that the employee's current total physical disability was related to her preexisting lumbar degeneration. (Dec. 6, 8; Ex. 4.) The employee's issue lies in the doctor's deposition testimony. In his testimony on August 26, 2015, the doctor was asked whether an EMG study would be of any diagnostic benefit.

> Dr. Martin: If it were positive, and depending on whether there were acute changes versus chronic changes, one could put a certain timeline to her ongoing complaints. But an EMG is not likely to be positive in this case, because

there are no neurologic findings. EMGs for true nerve root pain can often be negative.

. . . . .

Question: And if an individual, such as Miss Pickett, was complaining of radiating pain into either left or right extremity and had the fall, as we have discussed, and had a positive EMG, would that sway your opinion as to whether the fall was a precipitating or aggravating cause for her problem?

Dr. Martin: If it were positive for purely chronic changes and done at this time, that would sway me that there was one event. There could have been one event in the past, and there is not anything ongoing at this point, If there are acute changes, that's an ongoing phenomenon and unrelated to an injury.

. . . .

If it's an acute ongoing, it means it's ongoing pressure on the nerves, and nerves are having an ongoing reaction, that would more likely be the ongoing spinal stenosis and not related to a distant injury.

Question: But chronic would be indicative of what?

Dr. Martin: Sole chronic changes would then lead one back to being either their old chronic changes, based on the stenosis, but given an injury history here, if there were just chronic changes, that would lead me more towards the side of the injury could have played a role.

Question: And what role would the injury have played?

Dr. Martin: To injure the nerve at that time, and it was more of a one-time event and not an ongoing event at this point, *so it would be related. The current nerve pain would then, therefore, more likely be related to the injury phenomenon.*

(Dep., 37-40; emphasis added.)

The employee had an EMG performed on December 1, 2015, by Dr. Margot Geffrey, which was read as an "abnormal study," with mild-moderate

chronic reinervation in the tibialis posterior, tibialis anterior, and vastus lateralis, as well as borderline-mild, chronic reinervation in the long head of the biceps femoris. Rizzo, supra. The employee's counsel sent this report to the judge by e-mail on December 9, 2015, with a request that it be submitted into evidence, as it was relevant to the impartial's opinion that if an EMG showed chronic, as opposed to acute, findings, his opinion on causal relationship would change. The employee specifically referred to this EMG report and Dr. Martin's comments on its significance in her closing argument submitted on January 28, 2016, the date the record closed. (Dec. 3.) The judge did not list the EMG report in her review of the exhibits submitted by both parties. (Dec. 1-2.)

We have held in the past, and will continue to hold, that while a judge is not required to comment on each and every piece of evidence admitted into the record, she must list them in the decision, in order that we can determine whether the full record was considered by her in reaching her conclusions. Kenney v. Pembroke Hospital, 32 Mass. Workers' Comp. Rep. ___ (February 28, 2018). Failure to do so requires recommittal and consideration by the judge of the evidence not listed. That is what must occur in this case. Recommittal becomes especially important here, where the conclusion on causal relationship of the employee's continuing back pain may well hang in the balance. The judge must review all the medical evidence submitted, and then reconsider her finding on causal relationship of the employee's current disabling back pain to the industrial accident. If she finds that the employee's back pain is related to the accident, she must then revisit her findings on incapacity, taking into account the insurer's § 1(7A) defense, as that was not addressed in her decision.

For its part, the insurer argues the judge erred in finding the employee's present psychiatric disability was causally related to her January 12, 2012, industrial injury to her back, despite also finding that the employee's current back condition was due to her pre-existing lumbar degeneration, and not the stretch injury from the industrial accident. Essentially, the insurer argues that a physical

condition that initially caused the employee's psychiatric disability must remain actively causally related to the injury, otherwise the psychiatric condition is no longer compensable.[3]

The judge adopted the opinion of Dr. Michael Braverman, a board certified psychiatrist, that "the employee's major depression is directly causally related to her industrial injury, thus concluding the work injury is the major and predominant cause of her psychiatric disability and need for treatment." (Dec. 7.) The judge later noted that "[a] psychiatric impairment that arises from a compensable injury needs simple causation to establish liability against the insurer." (Dec. 9.) She is correct in her assessment of the applicable law up to a point, but there is a further element of causation that must be met in this case.

When a psychiatric disability is caused by a compensable physical injury, as opposed to the injury being solely psychiatric in nature, only simple "as is" causation is required to support a finding of incapacity. Cornetta's Case, 68 Mass.App.Ct. 107 (2007). However, we are presented here with a situation where the judge found the underlying causally related physical injury had run its course and no longer had an effect on the employee's physical condition.[4]

There are limits to causally relating a mental condition that is the result of a physical injury. In LaFlash v. Mount Wachusett Dairy, 18 Mass. Workers' Comp. Rep. 254 (2004), we noted that "an employee must only prove that the physical injury, even if now resolved, contributed to any extent to his emotional incapacity," Id. at 256, note 2, and Horan, J. concurring, at 264. However, we held that where the emotional condition depended on an ongoing causally related

[3] This issue may disappear if, on recommittal, the judge finds the employee's present physical back condition is related to her industrial injury. In that case the insurer's argument becomes moot. However, in the event that the judge does not change her conclusion on causal relationship, and because the issue is one of importance for future litigation, we address it here.

[4] Indeed, pursuant to Dr. Martin's adopted opinion, the judge ordered cessation of payment of medical treatment for the employee's physical injury as of January 12, 2014, nine months before Dr. Braverman rendered his first opinion in this case. (Dec. 7, 10.)

chronic physical condition (neck and right shoulder pain), the judge's finding that such a chronic condition no longer existed was sufficient to preclude a finding of causal relationship of the emotional condition. "[I]n the absence of chronic pain, limitations, or neurological findings, any psychiatric problems experienced by the employee are unrelated to the industrial accident." Id. at 261-262. See Sfravara v. Star Market Company, 15 Mass. Workers' Comp. Rep. 181, 182-185 (2001).

In the present case the judge wrote at the end of the decision, "I credit her testimony that her pain has never ended." (Dec. 8.) The impartial physician, Dr. Martin, whose opinion the judge adopted, felt that by twenty-four months after the injury, that is to say, January 12, 2014, the employee's ongoing pain and disability were no longer related to the work injury, but were likely related to her lumbar degeneration. (Dec. 6; Ex. 4, 3; Dep. 17.) Dr. Braverman, whose opinions the judge also adopted, (Dec. 7), wrote in his September 15, 2014, report:

> The patient's major depression, resultant total psychiatric disability, and need for further psychological and psychiatric treatment to alleviate the severity of the symptoms of depression, are all directly causally related to the accident at work. The work injury directly resulted in significant back injury *and ongoing chronic pain and physical impairments,* which directly precipitated the major depression. Thus the work injury is the major and predominant cause of her psychiatric condition . . . .

Ex. 6, 3 (emphasis added). On July 27, 2015, Dr. Braverman wrote a more succinct opinion, which the judge also adopted. (Dec. 7.)

> The patient's major depression, resultant total psychiatric disability, and need for ongoing treatment are all directly causally related to the accident at work which resulted in significant back injury which directly precipitated the major depression. Thus, the accident at work remains the major and predominant cause of her psychiatric condition . . . .

(Ex. 7, 3.)

Given that the judge adopted Dr. Martin's opinion and *both* of Dr. Braverman's opinions, without differentiating them, and given that in his

September 15, 2014, report Dr. Braverman appears to have related the employee's psychiatric condition to her "ongoing chronic pain and physical impairments," at best the judge's decision fails to resolve the apparent conflicts in the evidence, and, at worst, is based on an error of law. See O'Rourke v. New York Life Ins., 30 Mass. Workers' Comp. Rep. 303, 308 (2016)(where case concerns psychological sequelae of a physical injury, "the causal relationship of the psychological injury rises or falls on the causal relationship of the physical injuries the employee suffered as a result of the work accident"). Without further findings of fact, we cannot determine "with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993).

As the award must be vacated and the case recommitted for findings on whether the holding on causal relationship of the employee's ongoing back pain is changed by medical consideration of the EMG report, the judge must also make findings on whether the employee's psychiatric condition is related to her ongoing pain or was precipitated by the industrial injury. If she finds the employee's current back pain is not related to the injury, and her psychiatric condition is reliant on that continuing pain, the judge must deny and dismiss the employee's claim for § 34A benefits. If she finds the current back pain is related to the injury, or, alternatively, the psychiatric condition is not reliant on the ongoing pain but was initially caused by the physical injury, then the judge may award the employee § 34A benefits.[5]

[5] If the judge determines the employee's causally related disability was permanent and total on January 19, 2015, the award may begin on that date, notwithstanding that the employee claimed § 34A benefits beginning on December 12, 2015. The insurer has failed to raise this issue in its appeal, thus it has waived it. See note 2. See also, Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 43 n.5 (1977); Vallieres v. Charles Smith Steel Inc., 23 Mass. Workers' Comp. Rep. 415 (2009)(an appellee cannot achieve a more favorable result by failing to appeal).

Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,654.15.

So Ordered.

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William C. Harpin
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **August 24, 2018**